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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

FAIRFAX-BREWSTER SCHOOL, INC.,
Petitioner,

v.

COLIN M. GONZALES, Infant, by Raymond Gonzales and Margaret R. Gonzales, his parents

and

RAYMOND GONZALES and
MARGARET R. GONZALES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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and

RAYMOND GONZALES and MARGARET R. GONZALES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in its cases No. 73-2351 and No. 73-2352, which were consolidated with its cases No. 73-2348, No. 73-2349, and No. 73-2350.

OPINIONS BELOW

The opinion of the Court of Appeals, sitting *en banc*, and order amending the opinion, which appear at Appendix A, *infra*, is not yet officially reported. The memorandum opinion and order of the district court (App. B, *infra*) is reported at 363 F. Supp. 1200.

JURISDICTION

The judgment of the Court of Appeals in the consolidated cases (App. C, *infra*) was entered on April 15, 1975. Petitions for rehearing were timely filed by the respondents in cases No. 73-2351 and 73-2352, and by intervenor Southern Independent School Association in cases No. 73-2348, 73-2349, and 73-2350. The petitions for rehearing were denied by the Court of Appeals in its order entered May 29, 1975 (App. A, *infra*). This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether 42 U.S.C. Sec. 1981 prohibits a small private school for children from pre-primary levels through the sixth grade, which is not open to all white children in the geographic area but instead restricts admission to those who meet its established academic and other criteria, from excluding an otherwise qualified Negro applicant solely on account of his race.

2. If so, whether such prohibition is void because

   (a) it is not within the scope of the 13th amendment; or

(b) the statute is unconstitutionally vague; or

(c) the statute ought to be construed so that it will not violate constitutional freedoms of association and privacy.

3. Whether the district court abused its discretion in issuing a permanent injunction to the respondents who at the time of trial no longer lived in the area, the child being a student in a public school in another county, had never sought injunctive relief requiring admission of the child to the school, and had been denied class action status by the district court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are the First, Fifth, Ninth and Thirteenth Amendments to the Constitution of the United States. The statute involved is 42 U.S.C. Sec. 1981.

STATEMENT UNDER RULE 33(2)(b)

Since the proceeding draws into question the constitutionality of the Act of April 9, 1866, 14 Stat. 27, as codified in 42 U.S.C. Sec. 1981, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. Sec. 2403 may be applicable.

The United States Court of Appeals for the Fourth Circuit has, pursuant to 28 U.S.C. Sec. 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT OF THE CASE

Petitioner is a small private school for children with a Pre-primary department composed of Nursery through Senior Kindergarten and an Elementary department consisting of grades one through six. It receives no assistance, financial or otherwise, from any state, local or federal agency. The average number of pupils in the school in the year here involved (1969) was 177; in 1968 the number was 208; in 1970 the number was 207. Its educational objectives and practices are geared to high standards of excellence, and it practices selectivity in the admission of students on the basis of sound educational standards and criteria, including readiness, previous school record, age, and mental, physical and emotional maturity. It also operates a Summer Day Camp for children. The average number of children in the day camp in 1969 was 174; in 1968 the number was 145; in 1970 the number was 138. In the operation of its summer day camp the school also practices selectivity on the basis of age, school grade eligibility, maturity and other criteria. It is the school's policy to reject white applicants who do not meet its high standards for acceptance. It is not open to every white child in the area. Respondents are a Negro and his Negro parents, who applied for the child's admission to the summer day camp with the expectation of his being admitted to the first grade in the Fall. The child was then five and one-half years of age. These were the first Negroes to make application at the school since it commenced operations in 1955. On May 16, 1969, the application was rejected.

On December 19, 1972, respondents filed suit against the petitioner, on their own behalf and on behalf of other Negroes similarly situated, in the United States District Court for the Eastern District of Virginia, Alexandria Division, claiming that the rejection was for reasons of race and violated their rights under 42 U.S.C. Sec. 1981 and 42 U.S.C. Sec. 2000a (the claim under Sec. 2000a was withdrawn prior to trial) and seeking declaratory and injunctive relief as well as monetary damages and attorneys fees. The jurisdiction of the court was invoked under 28 U.S.C. Secs. 1337, 1343 (4), 2201 and 2202. On the same day, respondents and two other Negro parents and their child filed a virtually identical suit in the same court against the owners of another small private school (Bobbe's School), seeking the same relief on the same grounds and under the same statutes. The Southern Independent School Association intervened in the Bobbe's School case. The cases were consolidated for trial. The adult respondents testified at trial that after the rejection by petitioner, and rejection about a week later by Bobbe's School, the child was accepted immediately at another private school in the area, which he attended for the next two years; and that a month before trial the respondents had moved out of the area to another county where the child at time of trial was attending a public school.

After hearing the evidence and considering a memorandum of law submitted by petitioner, the district court found that the petitioner had rejected the application because the child was black, and that this was petitioner's policy. It ruled that under *Jones v. Mayer*, 392 U.S. 409 (1968) and *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973), Section 1981, like Section 1982 must be read literally, and that read literally it applied to the rejection of respondents' application. The district court concluded that "the purpose of both [Sections 1981 and 1982] is to prohibit

all racial discrimination against non-whites," but not to prohibit racial discrimination by non-whites against whites. The district court also concluded that inasmuch as the "end result" of petitioner's admissions policy was to exclude the infant because he was black, notwithstanding its strictly established criteria for the admission of non-blacks, petitioner had no "plan or purpose of exclusiveness" for selection of students "other than race," quoting *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969); and that because the "opportunity" to attend the school was open to "every white child," under *Tillman* petitioner could not be considered "truly private." The court also stated that "*Sullivan v. Little Hunting Park* has abolished traditional notions of what is 'private' insofar as these types of actions are concerned."

The district court (1) gave respondents a declaratory judgment that petitioner's policy with respect to the admission of students to its day camp and school discriminated on the basis of race or color in violation of Sec. 1981; (2) granted respondents a permanent injunction against petitioner, its agents and those acting in concert with it, prohibiting them from following such discriminatory admissions policy; (3) awarded compensatory damages in favor of the infant respondent, in the amount of $2,000; (4) awarded respondents attorney's fees in the amount of $1,000; and (5) denied class action status to respondents.

Petitioner appealed, respondents filed a cross-appeal, and Bobbe's School and the intervenor Southern Independent School Association appealed the decision in their case. The appeals were consolidated in the Court of Appeals, and were heard by seven judges sitting *en banc*. A majority of four of the judges affirmed the decision of the district court with respect to all issues except the issue as to the award of attorney's fees, with three judges dissenting. A majority of

four reversed the district court with respect to the award of attorney's fees, with three judges who had been in the majority on the other issues, dissenting.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' decision dealt with important questions of federal law which have never been considered and decided by this Court, and misconstrued and misapplied two of this Court's recent decisions. The three dissenting judges in their opinion stated that the principal legal issue in this case "is presented to this court as one of first instance in any federal court at this or higher level. We are bound by no definitive Supreme Court decision." (App. A, at p. 21a, *infra*).

In *Jones v. Mayer, supra,* this Court held that Sec. 1982 prohibits refusal by a real estate developer to sell a home in his development to Negroes because of their race, if it is on the market and he is willing to sell it on the same terms to white purchasers. Although there was a strong dissent by Mr. Justice Harlan, concurred in by Mr. Justice White, and there has been some criticism of the decision in the legal literature, especially with respect to its interpretation of the language and legislative history of the statute,[1] it has been followed by the Court in each of the two cases (*Sullivan* and *Tillman*) involving the Civil Rights Act of 1866 that have come before the Court subsequent to *Jones*. In each of the later decisions the Court applied Sec. 1981 or Sec.

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[1] See, *e.g.*, *Casper*, Jones v. Mayer: Clio, Bemused and Confused Muse, 1968 Sup. Ct. Rev. 89-132; *The Supreme Court*, 1967 Term, 82 Harv. L. Rev. 63, 93-103 (1968); *Ervin*, Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot, 22 Vand. L. Rev. 485, 495-97 (1969).

1982 to a situation that involved the sale, lease or use of real property or rights connected with real property. And it is significant that in both decisions the Court gave sanction to the limiting principle that private associations (or their facilities) which have a "plan or purpose of exclusiveness," and which are not "open to every white person within the geographic area, there being no selective element other than race", are not subject to the prohibitions of the statute. (*Sullivan*, at 396 U.S. 236, *Tillman* at 410 U.S. 438). Petitioner, with its high standards of excellence and selectivity in the admission of students on the basis of sound educational standards and criteria, clearly falls within that principle, and not within the prohibitions of Sec. 1981.

It should also be noted that in two other decisions subsequent to *Jones, Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), and *Gilmore v. The City of Montgomery*, 417 U.S. 556 (1974), the former involving a racially segregated private club and the latter racially segregated private schools, this Court held that in the absence of state action the Equal Protection Clause of the Fourteenth Amendment did not require the private club to admit a Negro guest, or require denial of the shared use of public facilities by the private schools.

In his dissent in *Jones* Mr. Justice Harlan questioned the Court's interpretation of the language and legislative history of Sec. 1982 making it applicable to purely private action. It was his opinion that the word "right" as used in the statute referred to a right to equal status under the law, and not to an absolute right enforceable against individuals. He also differed with the Court in its finding that the language of the statute was plain and unambiguous, and said at 392 U.S. 452:

> "The Court finds it 'plain and unambiguous,' *ante*, at 420, 20 L.Ed.2d at 1197, that this language forbids purely private as well as state-authorized discrimination. With all respect, I do not find it so. For me, there is an inherent ambiguity in the term 'right,' as used in Sec. 1982. The 'right' referred to may either be a right to equal status under the law, in which case the statute operates only against state-sanctioned discrimination, or it may be an 'absolute' right enforceable against private individuals. To me, the words of the statute, taken alone, suggest the former interpretation, not the latter."

At 392 U.S. 476, he referred to Sec. 1982 as "a loosely worded statute." After a review of the original wording of the Civil Rights Act of 1866, and of its legislative history, Mr. Justice Harlan concluded that Section I of the Act (which included what is now 42 U.S.C. Secs. 1981 and 1982) was intended to apply only to action taken pursuant to state or community authority.

Mr. Justice Harlan also dissented in *Sullivan*, and was joined in his dissenting opinion by the Chief Justice and Mr. Justice White. In the course of his opinion, at 396 U.S. 241, he described Sec. 1982 as "both vague and open-ended . . .", and at 396 U.S. 248, as "a very vague statute", and warned:

> "And lurking in the background are grave constitutional issues should Sec. 1982 be extended too far into some types of private discrimination."

Mr. Justice Harlan's warning was a prophetic one. For in petitioner's case the Court of Appeals has gone too far. Unaccountably, it went beyond the rulings of this Court in

Sullivan and *Tillman* and ignored the limiting principle clearly expressed in both of those decisions. Petitioner's school and summer day camp fully met the tests defined in *Sullivan* and *Tillman*, but the Court of Appeals misread those decisions, holding that Sec. 1981 prohibits acts of racial discrimination by a small private school for children irrespective of the fact that it is not open to every white person (child) in the area (or for which it has room), and irrespective of the fact that it does indeed have a plan or purpose of exclusiveness and does indeed impose strict selective requirements for admission other than race.

It has been noted that *Jones*, *Sullivan* and *Tillman* all involved situations relating to the purchase, lease, or use of real property, and rights incident to real property. The dissenting judges of the Court of Appeals argued that there is an essential difference between the right to purchase real estate, a purely commercial transaction, under Sec. 1982, and the claimed right to attend a small private school for children, under Sec. 1981. They pointed out that many other contracts are likewise purely commercial, but that the relationship of a teacher and student is one of status, which is related to the contract concept in the same way that the status of husband and wife may be said to grow out of a contract of marriage. "The contract aspect of the situation is minor and incidental and serves no purpose other than as a door opener in the present case to bring independent schools within the scope of Sec. 1981. The right to make and enforce contracts does not imply a right to coerce an unwilling co-contractor into making any and every variety of contract." (App. A, p. 22a, *infra*).

The dissenting opinion also noted that it was not until after the passage of the Civil Rights Act of 1964 that the Civil Rights Act of 1866, after lying dormant for 100 years,

was reactivated, and that whatever the intent of the 1866 Congress may have been, the 1964 Congress did not intend to restrict the admissions policies of independent schools. In this connection it is important to note that the legislative history of the 1866 Act does in fact provide persuasive evidence that it was *not* the intent of the 1866 Congress to apply Sec. 1981 to schools.

When the Civil Rights Bill of 1866 reached the House, the floor leader, Mr. Wilson of Iowa, Chairman of the Judiciary Committee, to which the bill had been committed, opened the debate, reading and explaining the bill in its entirety. In explaining that part of the bill containing the language which is now Secs. 1981 and 1982, he said:

> "This part of the bill will probably excite more opposition and elicit more discussion than any other; and yet to my mind it seems perfectly defensible. It provides for the equality of citizens of the United States in the enjoyment of 'civil rights and immunities.' What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several States? No; for suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government. *Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not civil rights or immunities. . . .*" (Emphasis supplied) Congressional Globe, 39th

> Cong., 1st Session (1866), H. p. 1117; Avins, The Reconstruction Amendments' Debates, Richmond, Va., 1967, page 163.

In *Jones* the Court gave particular weight to the statements of Congressman Wilson, quoting him twice, once at the close of the opinion, and he was quoted in the dissenting opinion twice and mentioned an additional time.

At a later point in the debate, Congressman Wilson explained that the "great fundamental civil rights" sought to be protected by the bill were, as defined by Blackstone, the right of personal security, the right of personal liberty, and the right of personal property; and as defined by Chancellor Kent (Kent's Commentaries):

> "The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and inalienable." Congressional Globe, 39th Cong., 1st Session (1866), H. p. 1118; Avins, *supra*, page 164.

The holding of the Court of Appeals in the instant case resulted from a failure to recognize the limiting principle established in *Sullivan* and *Tillman*, which was foreshadowed in *Daniel v. Paul*, 395 U.S. 298, 301-302 (1969), and reinforced in *Moose Lodge* and *Gilmore*, and from a failure to perceive the essential differences between Secs. 1981 and 1982 in language, scope, and Congressional intent, and between a purely commercial transaction on the one hand, and the education of children in a private school on the other.

The Thirteenth Amendment abolished slavery and involuntary servitude and granted Congress power to enforce the abolition by appropriate legislation. By the process of judicial interpretation the term "slavery" as used in the Thirteenth Amendment now includes what are called "the badges and incidents of slavery." This Court said in *Jones* at 392 U.S. 439, that the authority of Congress to enforce the Thirteenth Amendment by appropriate legislation included the power to eliminate all racial barriers to the acquisition of real and personal property, because such barriers are badges and incidents of slavery, and that therefore the refusal of the real estate developer, under the circumstances of that case, to sell a residence to Negroes, was a violation of Sec. 1982.

It has already been noted that in his dissenting opinion in *Jones,* concurred in by Mr. Justice White, Mr. Justice Harlan said that he did not find Sec. 1982 "plain and unambiguous;" that for him "there is an inherent ambiguity in the term 'right' as used in Sec. 1982 . . .", and that he also described Sec. 1982 as "a loosely worded statute." In his dissenting opinion in *Sullivan,* which was concurred in by the Chief Justice and Mr. Justice White, he described Sec. 1982 as "both vague and open-ended", and as "a vague statute." There is the same inherent ambiguity in the use of the term "right" in Sec. 1981 as Mr. Justice Harlan found with respect to its use in Sec. 1982. But Sec. 1981 far exceeds Sec. 1982 in vagueness and open-endedness, and in loose wording. Sec. 1982 is at least limited in its scope to transactions with respect to property. Sec. 1981, if read as the district court read it – literally – applies to every contact or communication between white and colored persons in a context that could lead to the making of a contract. If read as the Court of Appeals read it, it applies to every contact or communication between white and colored

persons in a context that could lead to the making of a contract, except "certain intimate and private affairs of men and women," as, for example, "the relations of husband and wife." (App. A, p. 12a, *infra*). In the area of private education, the Court of Appeals conceded another exception, in these words:

> "Should siblings combine to employ tutors for their children, they may exclude the rest of the world, for the rule of exclusivity bars the more distantly related and the unrelated regardless of race." (App. A, p. 13a, *infra*).

It is improbable that there are many such affluent siblings among the parents who prefer to educate their children in private schools like petitioner's.

The unlimited breadth of the language of Sec. 1981 makes it doubtful that Congress intended by that part of the Civil Rights Act of 1866 to give to non-whites the abolute right or power to force unwilling whites to enter into "contracts" with them. It may be assumed that many if not most of the members of the Congress were lawyers. Senator Trumbull of Illinois, who introduced the Civil Rights Bill and its companion measure, the Freedmen's Bureau Bill, in the Senate, was chairman of the Senate Judiciary Committee and a former state Supreme Court justice. (Avins, *supra*, page vi.). If they used the term "contract" in its ordinary sense, and as lawyers would use it, then they meant an agreement entered into by mutual assent, in which the parties exercised their free will, and were not coerced, intimidated or subjected to duress of any kind. With respect to Sec. 1981 at least, it is more likely that Congress was giving to the former slaves the legal status to make and enforce contracts, of which they may have been deprived during slavery or under the Black

Codes enacted in some of the states after adoption of the Thirteenth Amendment. Such deprivation of the legal status to make and enforce contracts clearly was one of the "badges and incidents" of slavery.

If, on the other hand, Sec. 1981 is construed as the Court construed Sec. 1982 in *Jones*, as giving non-whites an absolute right rather than a right of legal status, then it is clear that exclusion of a Negro child from a small private school for children, because of his race, cannot reasonably be considered one of the "badges and incidents" of slavery that the Thirteenth Amendment abolished, and as to which the Congress was authorized to enact "appropriate legislation," nor can it reasonably be concluded that Congress intended that a private act of discrimination of this kind would be within the scope of that part of the Act of 1866 that is now Sec. 1981.

II. The courts below have construed and applied Sec. 1981 so as to abridge the constitutional rights of freedom of speech, association and privacy of the petitioner and its patrons, which give to petitioner the right to maintain and operate a private school which is limited to or which excludes any racial, religious or other group it chooses, and to parents the right to educate their children in the school of their choice – whether public or private or parochial – including a private school which excludes Negroes. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Norwood v. Harrison*, 413 U.S. 455 (1973); *Gilmore v. City of Montgomery*, *supra*.

As this Court stated in *Wisconsin v. Yoder*, 406 U.S. 205 (1972):

"The history and culture of western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. If not the first, perhaps the most significant statements of the Court in this area are found in Pierce v. Society of Sisters, in which the Court observed:

'Under the doctrine of Meyer v. Nebraska, 262 U.S. 390 (67 L.Ed.2d 1042, 43 S. Ct. 625, 29 ALR 1446), we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.' 268 U.S. at 534-535, 69 L.Ed.2d at 1078."

These rights of the petitioner and the parents who are its patrons have their source in the Bill of Rights, and specifically in the First, Fifth and Ninth Amendments. In addition to the cases cited *supra*, see *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *NAACP v. Button*, 371 U.S. 415, 430-431 (1963);

the concurring opinion of Mr. Justice Goldberg, in which the Chief Justice and Mr. Justice Brennan joined, in *Griswold v. Connecticut, supra,* at 381 U.S. 488; *Roe v. Wade,* 410 U.S. 113 (1973); and *Healy v. James,* 408 U.S. 312 (1972).

In *United States v. Vuitch,* 402 U.S. 62 (1971) at p. 70, this Court said:

> ". . . statutes should be construed whenever possible so as to uphold their constitutionality."

And in *Arnett v. Kennedy,* 416 U.S. 134 (1974) at 162, the Court said:

> "We have observed previously that the Court has a duty to construe a federal statute to avoid constitutional questions where such a construction is reasonably possible. United States v. 200-ft. Reels of Film, 413 U.S. 123, 130 n. 7, 37 L.Ed. 2d 500, 93 X Ct. 2665; United States v. Thirty-seven Photographs, 402 U.S. 363, 368-369, 28 L.Ed.2d 822, 91 S. Ct. 1400."

See also, *Graham v. Richardson,* 403 U.S. 365, 382 (1971). It may well be, however, that the vagueness, ambiguity, open-endedness, and loose wording of Sec. 1981 will not permit of a constitutional construction, and that it must be struck down as unconstitutionally vague, because of its heavy impact on constitutionally protected freedoms. *Cramp v. Board of Public Instruction,* 368 U.S. 278 (1961); *Ashton v. Kentucky,* 384 U.S. 195, 200 (1966); *Whitehall v. Elkins,* 389 U.S. 54 (1967); *Zwickler v. Koota,* 389 U.S. 241 (1967), on remand 290 F. Supp. 244, rev'd on other grounds, *Golden v. Zwickler,* 394 U.S. 103 (1969); *Boutilier v. Immigration Service,* 387 U.S. 118, 123 (1967); *Keyishian v. Board of Regents of New York,* 385 U.S. 589 (1967); and *NAACP v. Button, supra,* at 432.

III. Respondents having been denied class action status, had to prove their right to individual injunctive relief at trial in order to be entitled to a permanent injunction. This principle has been firmly established in this Court. *O'Shea v. Littleton*, 414 U.S. 488 (1974). See also, *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Indianapolis School Commissioners v. Jacobs*, 43 L.Ed.2d 74, 95 S. Ct. 848 (1975); and *Moose Lodge, supra*. And see, *Lidie v. State of California*, 478 F.2d 552 (9th Cir. 1973); *Danner v. Phillips Petroleum Co.*, 447 F.2d 159 (5th Cir. 1971); *Ridley v. Hopper*, 485 F.2d 1377 (5th Cir. 1973); *Hollon v. Mathis Independent School District*, 491 F.2d 92 (5th Cir. 1974). Yet the uncontradicted testimony of respondents was that the infant respondent was admitted to another private school's summer day camp shortly after his rejection by petitioner; that he attended that private school for two years; that he attended a parochial school for two years; that a month before trial respondents moved out of the area, into another county, and that the infant respondent was at time of trial attending a public school there. Clearly, there was no continuing or threatened injury to the respondents in the maintaining by petitioner of what the district court had ruled was a racially discriminatory admissions policy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July, 1975.

APPENDIX A

[Filed April 15, 1975]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2348

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Russell L. Runyon, Katheryne E. Runyon,
Defendants,
Southern Independent School Association,
Appellant.

No. 73-2349

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Russell L. Runyon, Katheryne E. Runyon,
Appellants,
Southern Independent School Association,
Defendant.

No. 73-2350

Michael C. McCrary, infant by
Curtis L. McCrary and Sandra McCrary,
Plaintiffs,

Colin M. Gonzales, infant by Raymond
Gonzales and Margaret R. Gonzales,
Appellants,

v.

Russell L. Runyon, Katheryn E. Runyon,

Southern Independent School Association,
Appellees.

No. 73-2351

Colin M. Gonzales, infant by his parents,
Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Fairfax-Brewster School, Inc.,
Appellant.

No. 73-2352

Colin M. Gonzales, infant by his parents,
Raymond Gonzales and Margaret R. Gonzales,
Appellants,

v.

Fairfax-Brewster School, Inc.,

Appellee.

Argued April 2, 1974. Decided April 15, 1975

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. Before Haynsworth, Chief Judge, and Winter, Craven, Butzner Russell, Field and Widener, Circuit Judges, sitting en banc.

George S. Leonard and Louis Koutoulakos for Appellants in Nos. 73-2348, 73-2349 and 73-2350; Andrew A. Lipscomb (Gary R. Sheehan and Tolbert, Lewis and Fitzgerald on brief) for Appellants/cross-Appellees in Nos. 73-2351 and 73-2352; (Thomas J. Schwab on brief for Amici Curiae in Nos. 73-2348, 73-2349 and 73-2351; Allison W. Brown, Jr., (Robert M. Alexander and Roderick V.O. Boggs on brief) for Appellees/cross-Appellants in Nos. 73-2348, 73-2349, 73-2350, 73-2351 and 73-2352.

HAYNSWORTH, Chief Judge:

The issue in this case is whether 42 U.S.C.A. § 1981[1] prohibits private schools from denying admission to qualified black applicants solely on the basis of their race.

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[1] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons

(continued)

This appeal is a consolidation of two suits initiated by parents of black children who claim that they were denied admission to the appellant schools because of their race.

The Southern Independent School Association intervened in these actions, alleging that it is an association representing over 300 private, non-profit schools in the South, some of which concededly are racially exclusive in their admission policies. The position of the intervenor is simply that racial discrimination by private schools is not prohibited by § 1981, and, in any event, cannot be constitutionally prohibited.

I.

As found by the trial judge, in early May 1969, the parents of Colin Gonzales contacted the Fairfax-Brewster School, a private school located in Fairfax County, Virginia, about enrolling their son in the school's summer day camp program, and continuing into the first grade in the fall. The Gonzales' learned of Fairfax-Brewster through a mass mailing addressed to "Resident," an advertisement in the Yellow Pages in the telephone book, and from a friend whose son attended the Summer Camp.

Thereafter, the Gonzales' visited the school and, being pleased with what they saw, completed an application for their son. They also furnished, as required, a medical certificate and application fee. On May 16, 1969, the medical certificate and application fee were returned, accompanied

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[1] (continued) and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

by a form letter stating that the school was "unable to accommodate the application." No further explanation was given.

Mr. Gonzales called the school and spoke with someone who identified himself as Captain Reiss. In response to Mr. Gonzales' inquiry as to why his son's application was rejected, he was told that the school was not integrated.

Captain Reiss is the Chairman of the Board of Fairfax-Brewster School. His son, Robert, is the Administrative Director, and his daughter-in-law Olga is the Registrar.

Both Captain Reiss and his son deny any such conversation. They testified that Colin, age 5-1/2, was rejected because they felt that the kindergarten he had previously attended gave Colin insufficient preparation for the first grade at Fairfax-Brewster. Because they found Colin unqualified for the first grade, the Reisses concluded that "there was no point" in allowing him to enter the summer camp only to have to "yank him out" at the beginning of the academic year.

Subsequent to their son's rejection from Fairfax-Brewster, the Gonzales' telephoned Bobbe's School, and were told that only members of the Caucasian race were accepted.

In August 1972, Mrs. McCrary called Bobbe's School about enrolling her two-year-old son, Michael, in the nursery school. She asked whether the school was integrated and accepted blacks, and was told it did not. She did not file a formal application with Bobbe's.

Mr. Gates, the superintendent of Bobbe's, testified that he never received a call from either the Gonzales' or Mrs. McCrary. He testified that the school does not discriminate on the basis of race, although he said that no black child had ever applied.

The district court found the testimony of the Reiss "unbelievable," and concluded that Colin had been rejected from Fairfax-Brewster because of his race. He further found that both the Gonzales and Mrs. McCrary had called Bobbe's and had been told that the school would not accept blacks. It held that "[i]t is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told it was useless."

Accordingly, the court concluded that the appellant schools practiced racial discrimination in their admissions policies.

On the authority of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) and *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973), it held that § 1981 prohibits racial discrimination in private contractual arrangements, even when there is no state involvement. Therefore, it held that the schools were in violation of § 1981 in their admissions policies, and permanently enjoined defendants and intervenors from discriminating against blacks in enrollment in their schools. In addition, it awarded damages for embarrassment, humiliation and mental anguish to Colin, Michael and Michael's parents, and attorney's fees against Fairfax-Brewster and Bobbe's. *Gonzales v. Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200 (E.D. Va., 1973).

Defendants and intervenor appeal. We affirm the injunction and the award of damages, but reverse the award of attorney's fees.

II.

Initially, the appellants contest the district court's findings of facts, urging that the district court was clearly erroneous in concluding that Fairfax-Brewster and Bobbe's practice racial discrimination.

There was conflicting testimony as to whether the Gonzales had been told that Fairfax-Brewster was not integrated and whether both the McCrarys and Gonzales' were told that Bobbe's was not integrated. Resolution of this conflict depended upon the district court's evaluation of the credibility of the witnesses. We may not reverse a trier of fact, who had the advantage of hearing the testimony, on a question of credibility.

In addition, the testimony of the black parents was corroborated and supported by the testimony of two other witnesses. Mrs. Bryant testified that she had telephoned Fairfax-Brewster and Bobbe's to inquire about their admissions policies and was told that the schools were not integrated. Mr. Brooks, Mrs. McCrary's supervisor at her job, testified that a Mr. Gates, at Bobbe's, told him, over the telephone, that Bobbe's did not accept blacks.

The trial judge also thought that the Reiss's story that Colin was rejected on educational rather than racial grounds was undercut by the fact that Fairfax-Brewster allows applicants to take an entrance examination when previous scholastic preparation is inadequate. Colin was not given this opportunity.

In short, there is ample evidence in the record to support the trial judge's factual determinations, and we are unable to say that, viewing the record as a whole, he was clearly erroneous in concluding that Colin and Michael were denied admission to the schools because of their race.

III.

The substantive legal questions, which have been the subject of varied comment in the literature,[2] we think were correctly resolved by the district court. Section 1981 is a limitation upon private discrimination, and its enforcement in the context of this case is not a deprivation of any right of free association or of privacy of the defendants, of the intervenor, or of their pupils or patrons.

A.

It may once have been supposed that § 1981 served only the limited office of removing legal disabilities which state statutes imposed upon black people. It, of course, did cancel state statutes which imposed restrictions upon the right of blacks to contract, but the Supreme Court has clearly held that it did much more than that. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229; *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973).

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[2] *See*, Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974); Note, Desegregation of Private Schools: Section 1981 as an Alternative to State Action, 62 Geo. L.J. 1363 (1974); Note, Segregation Academies and State Action, 82 Yale L.J. 1436 (1973); Comment, Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc., 122 U. Pa. L. Rev. 471 (1973); Recent Decisions, 45 Miss. L.J. 246 (1974); Recent Decisions, 8 U. Rich. L. Rev. 285 (1974); Recent Cases, 42 U. Cin. L. Rev. 767 (1973); Recent Cases, 26 Vand. L. Rev. 1307 (1973).

In *Jones v. Mayer*, the Court was concerned with the right to purchase real estate. There a real estate developed had refused to sell a residence in a "white area" to the black plaintiff. Analyzing the text and legislative history of § 1 of the Civil Rights Act of 1866,[3] the Court held that § 1982 applied to purely private activity and provided a judicial remedy. As so construed, it was held that enactment of § 1982 was a valid exercise of the power of Congress under the enforcement clause of the Thirteenth Amendment, which gave Congress power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery."[4] The Court concluded that, unlike the Fourteenth Amendment, the Thirteenth reached private conduct in which no state action was involved.

As an intellectual exercise, the historical reading and interpretation of the majority in *Jones v. Mayer* may be debatable. *See* VI History of the Supreme Court of the United States; Fairman - Reconstruction and Reunion, 1207, *et seq.* That reading and interpretation was followed in *Sullivan v. Little Hunting Park* and in *Tillman v. Wheaton-Haven*, however, and, for us, is firmly established.

Jones v. Mayer, of course, dealt with § 1982, assuring the right to purchase property. We deal with § 1981, assuring the right to contract, but both sections derive from § 1 of the Civil Rights Act of 1866. Both are subject to the same analysis and must be interpreted in the same light. In *Tillman v. Wheaton-Haven*, the claim of the guest and the host rested upon § 1981. The Supreme Court expressly noticed

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[3] 14 Stat. 27.

[4] Civil Rights Cases, 109 U.S. 3, 20 (1883).

the relation between § 1981 and § 1982, their common derivation from § 1 of the Civil Rights Act of 1866 and the necessity of according them similar interpretation.

It is contended here, however, that § 1981 confers no right of action unless the contract denied the aggrieved person was open to all white people. It seems obvious that the relationship between the school on the one hand and a pupil and his parents on the other hand is a contractual one and that admission is a part of the process of forming such a contractual arrangement. It is also true that admission to the school is not open to all white people because there are academic, financial and other restrictions upon admission. Within the qualified class, however, there is no other limitation upon the admission of white applicants up to the school's capacity.

We may not read § 1981 so restrictively as the schools would have us to do it. The school may not refuse with impunity to accept an otherwise qualified black applicant simply because it declines to admit unqualified white applicants. The section is violated by the school as long as the basis of exclusion is racial, for it is then clear that the black applicant is denied a contractual right which would have been granted to him if he had been white.

What we have said should not be read to call into question the right of the school to insist upon an evenhanded requirement of academic and other racially neutral qualifications. Indeed, the right of the school to be selective on those bases is unquestioned here. All that is contended and all that we hold is that § 1981 prohibits the rejection of a black applicant when his qualifications meet all other requirements and race is the only basis for his rejection.

B.

As applied here, we see no violation of any constitutionally protected rights of free association and of privacy.

There is a protected right of free association. As stated by the Supreme Court in *NAACP v. Alabama*, 357 U.S. 449 (1958), "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of ***freedom of speech." *Id.* at 460. The constitutional protection, however, is essentially an attribute of First Amendment rights and would not ordinarily justify exclusion of others sharing the same beliefs and ideas. Here, at least, there is no showing that discontinuance of their discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.

Nothing in § 1981 impedes parents in their exercise of a choice of a private school presenting ideas or having educational methods or practices which are not available in the public schools. They may do the same thing to avoid ideas and influences in the public schools which they regard as unhealthy. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Among private schools, they are free to prefer one with a certain curriculum or dogma over others, but the school, while it may exclude applicants on the basis of neutral principles, may not exclude on the basis of race.

There is also a right of privacy. Its constitutional basis may be elusive, but it has clearly been held to exist. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Though certain intimate and private affairs of men and women are protected from governmental interference, the schoolhouse is far from the realm of protection. The right

is appropriately recognized in certain instances when only a few people are involved in activity unintended for the public view. In such instances, it is more than likely or inevitable that there is some plan or purpose of exclusiveness other than race. When relations between husband and wife are involved, their purpose to exclude all the rest of the world has no racial connotations. When a school holds itself open to the public, however, or even to those applicants meeting established qualifications, there is no perceived privacy of the sort that has been given constitutional protection.

Indeed, § 1981 does not purport to reach all private associations. It reaches only those which evidence "no plan or purpose of exclusiveness" other than race. *Sullivan v. Little Hunting Park, supra.* Private associations having non-racial criteria for the selection of members may apply their criteria, even if it results in a disproportionate impact upon the members of one race. It is only when blacks are excluded because they are black, or denied a right to contract which would be granted were they white, that § 1981 is violated.

Nor do we read anything in *Norwood v. Harrison,* 413 U.S. 455 (1973), as holding that rights of association or rights of privacy, or both combined, prevent the application of § 1981 here. In *Norwood* the Supreme Court struck down a Mississippi statute giving free textbooks to all students, including those attending private, segregated schools. Mississippi contended that its failure to furnish free textbooks to students in private, segregated schools would violate the equal protection clause and would undermine the right of the parents to send their children to private schools. In answer, the Court observed that because "the Constitution may compel tolerance of private discrimination in some circumstances does not mean that it requires state support for such discrimination." 413 U.S. at 463.

The observation in *Norwood* is far from a holding that segregation in a private school is constitutionally protected. Earlier in the opinion the Court had observed that no such question was presented. 413 U.S. at 457. Nor are we met with the question whether segregation in private schools is itself a violation of the Thirteenth or Fourteenth Amendment. We deal with a specific statute passed in implementation of the Thirteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966); Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum.. L. Rev. 449 (1974).

Finally, the Court in *Norwood* recognized the thrust of § 1981 and § 1982 when it noted that private discrimination "has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment." 413 U.S. at 470. We deal with such circumstances. In short, we cannot read *Norwood* as a holding that segregation in private schools such as these is constitutionally protected so as to be beyond the reach of § 1981.

C.

Some schools may be so private as to have a discernible rule of exclusivity which is inoffensive to § 1981. Should siblings combine to employ tutors for their children, they may exclude the rest of the world, for the rule of exclusivity bars the more distantly related and the unrelated regardless of race. The schools here are not private in that sense, and there is no discernible neutral rule of exclusivity which would bar these plaintiffs. The schools are private only in the sense that they are managed by private persons and they are not

direct recipients of public funds. Their actual and potential consistency, however, is more public than private. They appeal to the parents of all children in the area who can meet their academic and other admission requirements. This is clearly demonstrated in this case by the public advertisements. Within that constituency, they may not exclude a black applicant, solely because of his race, while accepting white applicants with comparable qualifications.

IV

The district court awarded damages for embarrassment, humiliation and mental anguish suffered plus an award of attorney's fees. The schools complain of both.

A.

It is not helpful to look to state decisions in personal injury tort cases in which damages for such injuries are denied.[5] That damages are recoverable for violations of § § 1981 and 1982 is established by *Sullivan v. Little Hunting Park, supra,* 396 U.S. 229, 240, in which we are told, "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."

Section 1981 doubtless was intended to give to the former slaves access to opportunities for material betterment of themselves, but it was also intended to remove the stigma

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[5] After the recent decision of the Virginia Supreme Court in *Womack v. Eldridge,* 43 U.S.L.W. 2267 (Va. December 2, 1974), it is arguable that the plaintiffs here could recover damages in a state tort action for emotional distress. For an earlier discussion of Virginia's requirement of a resulting physical injury in distress cases, see *Hughes v. Moore,* 214 Va. 27, 197 S.E.2d 214 (1973).

which accompanied the disabilities under which they formerly had labored. The plain command of the statutes is that those formerly enslaved henceforth shall be treated as having all of the rights and dignity of other people dwelling with them in a land of freedom. A denial of those statutory rights is treatment of the victim as being subject to those earlier disabilities. It is an affront, of which embarrassment and humiliation are natural consequences. If the statute is to be enforced fairly, if injuries suffered directly because of its violation are to be fairly compensated, damages for embarrassment and humiliation must be recoverable in a case such as this.

B.

The award of attorney's fees stands in a different posture. It is one thing to award damages for the invasion of a legal right and quite another to impose all of the litigation costs on the defendant. Unlike damages, attorney's fees have been granted only in narrowly defined circumstances.

We have recognized the propriety of an award of fees when a party maintained his position in bad faith, displaying "obstinate obduracy." *Brewer v. School Board of City of Norfolk*, 4 Cir., 456 F.2d 943, 948-52. The district court, however, made no finding of "obstinate obduracy,"[6] and we can see no basis for such a finding. Since this suit involves a novel application of a recently revived statute, the litigation of the issues cannot be equated with the recalcitrance we found in *Brewer*. Although at trial the parties

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[6] In refusing punitive damages, the district court found that the defendants had not "acted recklessly or wilfully in disregard of clear existing law." 363 F. Supp. at 1205 n. 5.

recounted different versions of the facts and the court accepted the plaintiffs' story, the finding suggests no bad faith or perjury. Faults in perception or memory often account for differing trial testimony, but that has not yet been thought a sufficient ground to shift the expense of litigation.

Attorney's fees, of course, are available where Congress has expressly authorized them. A conspicuous example is Title II of the 1964 Civil Rights Act.[7] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Section 1981 never contained a provision for fees, and although the Emergency School Aid Act of 1972 expressly allows fees in suits to desegregate public or federally aided secondary or elementary schools,[8] plaintiffs have made no showing of federal aid to, or state action by, the defendants.

In the absence of expressed congressional direction, we are presented with the question whether to adopt a "private attorney general" theory. Although application of that theory may be proper in some actions based on the 1866 and 1870 Civil Rights Act, it would be inappropriate in this case. In considering an award of fees in an action based on the older civil rights statutes, we look to more recent congressional determinations that a policy is so important or public enforcement mechanisms are so ineffective that attorney's fees are necessary to promote private enforcement. Mere provision of a private cause of action is not sufficient.

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[7] 42 U.S.C. § 2000a-3(b).

[8] 20 U.S.C. § 1617 (allowing fees against a "local educational agency, a State . . . or the United States" for a violation of that Act, Title VI, of the 1964 Civil Rights Act or the Fourteenth Amendment). *See* Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974); Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427 (1973).

A statutory grant of attorney's fees in suits covering the same subject matter, however, would be a strong indication of such a congressional determination.

In *Lee v. Southern Home Sites Corp.*, 5 Cir., 444 F.2d 143, Judge Wisdom looked to the enactment of the Fair Housing Law of 1968, which contained a fees section, 42 U.S.C. § 3612(c), in deciding that fees were available to a plaintiff seeking to redress racial discrimination in the sale of houses under § 1982. In 1968 Congress had acted, pursuant to its powers under the Thirteenth Amendment,[9] to prohibit discrimination in the sale of private housing.[10] In Lee's § 1982 action, he proceeded against precisely the discrimination that Congress had sought to curb by providing for an award of reasonable fees for his attorney to a prevailing plaintiff in a private enforcement action.

Employment discrimination suits provide another example of judicial allowance of fees under the older, more general civil rights stautes. We have recognized that a plaintiff under Title VII might recover attorney fees.[11] Reaching beyond Title VII, courts have allowed fees in actions brought under the older civil rights statutes to eliminate similar employment. discrimination. *Fowler v. Schwarzwalder*, 8 Cir., 498 F.2d 143, (§§ 1981, 1983); *Harper v. Mayor and City Council of Baltimore*, D. Md., 359 F. Supp. 1187, 1218-19, *modified*

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[9] United States v. Hunter, 4 Cir., 459 F.2d 205, 214.

[10] After December 31, 1968, the Act applied to all dwellings, 42 U.S.C. § 3603(a)(2), except those enumerated in § 3603(b). In *Lee* it was not clear whether the Act applied since the transactions occurred before December 31, 1968, and evidence on the applicability of § 3603(a)(1), which covered that time period, was not recounted in the opinion.

[11] 42 U.S.C. § 2000e-5(k); Lea v. Cone Mills Corp., 4 Cir., 438 F. 2d 86; Robinson v. Lorillard Corp., 4 Cir., 444 F.2d 791.

on other grounds sub nom., Harper v. Kloster, 4 Cir., 486 F.2d 1134 (§§ 1981, 1983); *Cooper v. Allen,* 5 Cir., 467 F.2d 836 (§ 1981). In *Cooper* the plaintiff based his suit on racial discrimination in hiring by a municipal golf course, but he failed to go through the conciliation procedures of Title VII and could not proceed under the statute. Nevertheless, Congress had authorized fees in the similar Title VII action to encourage private elimination of such discrimination. Where plaintiffs advance precisely the same congressional goal by the use of a more general statute, they may be entitled to attorney's fees. That is not to say, however, that once fees are awarded in any § 1981 or § 1982 case, they should always be granted in actions based on those statutes. The focus of the inquiry should be whether the plaintiffs advanced a goal the attainment of which Congress sought to further by providing for the recovery by a prevailing plaintiff of his attorney's fees.

In this case the plaintiffs have not acted to foster a goal that Congress deemed so urgent. The Emergency School Aid Act spoke only to desegregation actions against public and federally aided schools. Unlike the Federal Housing Law or Titles II and VII of the 1964 Civil Rights Act, the statute does not aim to eliminate discrimination from a facet of private American life. The limitation in that statute to public schools is not merely a technical or procedural restriction, but goes rather to the substance of the congressional goal. Without some congressional direction, even by analogy, we will not award attorney's fees, but will adhere to the usual rule that prevailing plaintiffs may not recover their attorney's fees,[12] for we find none of the recognized

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[12] Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

exceptions applicable.[13]

AFFIRMED IN PART.
REVERSED IN PART.

BUTZNER, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I, II, III, and IV-A of the opinion. I dissent from Part IV-B, which reverses the district court's allowance of attorney's fees. I would adhere to our practice of sustaining a district judge who, for sound reasons, had allowed attorney's fees. His discretion can be justified in this case on two grounds: the appellees acted as private attorneys general, and, alternatively, the appellants' defense was tainted by obdurate obstinacy.

By prosecuting this single case, the appellees invalidated the racially exclusive admission practices of over three hundred schools represented by the Southern Independent School Association, as well as the practices of Fairfax-Brewster and Bobbe Schools. In so doing, they vindicated congressional policy by abolishing an aspect of racial discrimination prohibited by the Civil Rights Act of 1866 [42 U.S.C. § 1981]. This type of suit is encompassed by the private attorney general doctrine, which is applicable to suits brought under the Civil Rights Acts of 1866, 1871, and 1964. *See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., 3-judge court), *aff'd mem.*, 409 U.S. 942 (1972). Under this doctrine, the award

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[13] See Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

is not dependent on proof of bad faith, for good or bad faith is irrelevant. Brandenburger v. Thompson, 494 F.2d 885, 888 (9th Cir. 1974). Nor does the receipt of compensatory damages preclude an award of attorneys' fees, Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972), though, of course, a court may take damages into account when awarding a fee. *See* Lee v. Southern Home Sites Corp., 444 F.2d at 147.

Alternatively, attorneys' fees are justified when dependants display obdurate obstinacy. *See* Brewer v. School Board of City of Norfolk, 456 F.2d 943 (4th Cir. 1972) (dictum). The district court's findings, amply supported by the record, demonstrate that the officers of the schools did not truthfully recount under oath the facts of the case. Such bad faith in the conduct of litigation is a pernicious form of obstinacy that can no more be tolerated than out-of-court bad faith. *Cf.* Hall v. Cole, 412 U.S. 1, 15 (1973). This behavior should not be excused simply because this case involves a novel factual situation. *Cf.* Lea v. Cone Mills Corp., 438 F.2d 86, 88 (4th Cir. 1971); Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 536 (5th Cir. 1970).

Finally, I believe that the enactment of 20 U.S.C. § 1617 directing the allowance of fees in public school desegregation cases does not create an inference that Congress intended to withdraw from district courts "the inherent equitable power"[14] of a chancellor to allow fees in actions against private schools when the facts otherwise justify the award because the plaintiffs acted as private attorneys general or the defendants displayed obdurate obstinacy. Other courts confronted with analogous problems have ot restricted the

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[14] *See* Hall v. Cole, 412 U.S. 1, 5 (1973).

allowance of fees in suits brought under the earlier Civil Rights Acts to instances where Congress has subsequently authorized fees in related legislation. *See, e.g.*, Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (welfare benefits); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., three-judge court), *aff'd mem.*, 409 U.S. 942 (1972) (reapportionment). Indeed, the drastic limitation on the allowance of fees in civil rights cases suggested by the majority appears to be without precedent.

Judge Winter and Judge Craven concur in Parts I, II, III, and IV-A of the court's opinion. They join Judge Butzner in dissenting from Part IV-B.

RUSSELL, FIELD, and WIDENER, Circuit Judges, concurring and dissenting:

I

We concur in the result reached in part IV-B of the opinion of the court. We would not, of course, reach the question of attorneys' fees if our view on the merits prevailed. Otherwise, we respectfully dissent.

II

In its opening paragraph, the majority opinion correctly states the legal issue[1] in this case. We add, however, that the issue is presented to this court as one of first instance

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[1] We are not convinced that the district court's findings of fact are not clearly erroneous. Such laments, however, being largely unavailing, see *United States v. Johnston*, 268 U.S. 220, 227 (1925), we address ourselves to the important legal issue here presented.

in any federal court at this or higher level.[2] We are bound by no definitive Supreme Court decision.

The majority regard *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), followed in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); and *Tillman v. Wheaton-Haven Recreational Association*, 410 U.S. 431 (1973), as being controlling precedents. We do not so regard those decisions.

We believe that the majority has been unduly impressed by the historical relationship between §§ 1981 and 1982, and has failed to discern the difference between the right to purchase real estate and the right to attend an independent school inferred from the right to "make and enforce contracts." The purchase of real estate, with its attending prequisites, is a commercial transaction pure and simple, and many other contracts are likewise purely commercial. On the other hand, the relationship of teacher and student is one of status, which is related to the contract concept in the same way that the status of husband and wife may be said to grow out of a contract of marriage. The contract aspect of the situation is minor and incidental and serves no purpose other than as a door opener in the present case to bring independent schools within the scope of § 1981. The right to make and enforce contracts does not imply a right to coerce an unwilling co-contractor into making any and every variety of contract.

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[2] In *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D. N.C., 1971), the United States District Court for the Western District of North Caroline held the refusal of a barber school to admit black students constituted a violation of § 1981. On the other hand, in *Riley v. Adirondack Southern School for Girls*, 368 F. Supp. 392 (C. D., Fla. 1974), the court refused to apply § 1981 to a racially segregated independent school. The decision is based at least in part on factual determinations. See also, *Segregation in Private Schools*, 122 U. of Penna. L. Rev. 471, at 475 (1973).

The majority opinion also fails to recognize *Moose Lodge v. Irvis*, 407 U.S. 163 (1972); and *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974). True, those cases do not involve § 1981 or § 1982, but involve the problem of State action under the Fourteenth Amendment. However, they do show that answers to apparently the same type of technical questions in this field may vary according to the facts of each particular situation.

Legal problems arising out of a purpose to readjust interracial relationships fall into four categories: (1) those arising under the Fourteenth Amendment; (2) those created by the Civil Rights Acts of the 1960's; (3) those resulting from conditions imposed by the Federal Government upon benefits bestowed such as aids to education; and (4) those arising from the resurrection of the post-Civil War Civil Rights Act of 1866 and the several acts of the 1870's, now found in 42 USCA §§ 1981, *et seq.* Legal problems involving the issues regarding the newly enfranchised slaves were acute until the *Civil Rights Cases*, 109 U.S. 3 (1883). Thereafter, such legal problems became stereotyped until the landmark decision in 1954 of *Brown v. Board of Education*, 347 U.S. 294 (1954). That case introduced the first of the above four categories, which is still paramount. Racially discriminatory action may be struck down under the Fourteenth Amendment provided State action is involved. In the 1960's, the Congress forbade racially discriminatory practices under the Civil Rights Acts of 1964 and 1968. Those acts did not touch private action in some fields. To cover this hiatus, the post-Civil War Civil Rights Acts were resurrected. The leading case is *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which was decided after the passage of the Civil Rights Act of 1964.

After the Thirteenth Amendment abolished slavery in 1865, various States passed Black Codes designed to keep those who were newly enfranchised as second-class citizens if citizens at all. Although such former slaves were now free, the objective was to keep them from exercising the legal rights usually associated with free citizenship such as the ownership of property and the making of contracts. See *Private Discrimination*, 74 Col. L. Rev. 450, 452 (1974). To counteract this movement, the Fourteenth and Fifteenth Amendments were eventually adopted. More immediately, however, the Civil Rights Act of 1866 was passed. It was based upon § 2, the enforcement section, of the Thirteenth Amendment which, unlike the Fourteenth Amendment, did not require State action. What is now 42 USCA §§ 1981 and 1982, were section one of the Act of 1866. And there were misgivings as to the constitutionality of the Act. Simply, they were that the Thirteenth Amendment abolished slavery, and conduct, such as that prohibited by the 1866 Civil Rights Act, did not constitute the reestablishment of slavery in the strictest sense of the word. Because of the constitutional doubt just mentioned, the provisions of the Civil Rights Act of 1866 were reenacted, practically intact, in various statutes passed during the 1870's, after the effective date of the Fourteenth Amendment. Section One of the Act of 1866 was reenacted in 1870 and is now represented by 42 USCA §§ 1981 and 1982. Only the 1866, and not the 1870, Act is here pertinent because State action is clearly not involved in our case. The Acts of 1866 and 1870 were dormant for so many years that in civil law countries a desuetude would have occurred.[3] Not until after the passage of the Civil Rights Act of 1964 was the 1866 Act reactivated. The 1964 Act

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[3] Our dissent is not bottomed on this premise. See *Jones*, p. 437.

made no attempt to prevent racial discrmination in the admission policies of independent schools. If the Thirteenth Amendment authorized Congress to forbid independent schools to use race as an admissions criterion in 1866, it likewise did so in 1964. Whatever the intent of the 1866 Congress may have been, it must be that the 1964 Congress did not intend to restrict the admissions policies of independent schools.

The application of 42 USCA § 1981 to this case may be approached either as a matter of interpretation or as a matter of constitutionality: *i.e.*, (1) what does § 1981 forbid? (2) is § 1981 constitutionally valid? Here, those two questions merge together. Section 1981, as any other statute, should be construed, in the light of constitutional limitations, to uphold its validity. See *Graham v. Richardson*, 403 U.S. 365, 382 (1971).[4]

While dissenting, we wish to make it clear that we do not necessarily express approval of the alleged restrictive admissions policies of the appellants. What is involved here is a collision between competing social interests, any of which, standing alone, would be regarded with favor.

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[4] Our result would be the same whether we construe § 1981 as being in conflict with the constitutional right of free association, or construe it consistent therewith. Of course a statute falls if in conflict with the Constitution. *The Federalist*, Nos. 16, 78, Hamilton; No. 44, Madison. In this connection, footnote 3 of the district court's opinion is curious (363 F. Supp. 1200 at 1204). That note states that although § 1981 forbids discrimination by whites against non-whites, it does not forbid discrimination by non-whites against whites or other non-whites. Such a construction would make the section clearly unconstitutional. Simply put, the opinion of the district court is that all races, so far as § 1981 is concerned, may operate racially segregated schools except the white race. Either all may do so (as we

(continued)

On the one hand, our society has an interest in the upward mobility of all of its citizens, unhampered by invidious distinctions. A corollary of this is an interest in educational opportunities.

This interest in educational opportunity as a means of upward mobility is confronted by social interests in the true independence of private educational institutions, and in the right of voluntary association and non-association. Although the backbone of our educational system must of necessity be found in our public schools, in a diverse society such as ours the leavening value of educational instutions which are autonomous and free from control by the federal and state governments is generally and legally accepted. Compare *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Society has an interest in preserving the true independence of such institutions.

The other social inteest which supports the position of appellants is the interest in free association. It is conceded that, as a general matter, enforced association is foreign to our institutions. Mr. Justice Douglas, in his dissenting[5] opinion in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), stated, at p. 179, the proposition thus:

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4 (continued)

contend), or none may. Such a restrictive construction of § 1981 also goes against the plain language of the statute. The section provides: "*All* persons . . . shall have the *same* right . . . to make and enforce contracts . . . as is enjoyed by white citizens, and shall be *subject to like* [disabilities of various kinds] . . ." (emphasis added). To give non-whites greater rights than whites would run contra to the statute, the same as giving them less rights would violate it.

[5] The force of Mr. Justice Douglas' statement is not reduced by the fact that it was part of a dissenting opinion; in fact, it is accentuated. The issue in the case was whether the fact that a private club dispensed liquor by virtue of a State license made its action State action. The majority thought not; Mr. Justice Douglas thought so. Thus, the quoted language was opposed to the main thrust of the opinion.

> "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be selective as he desires."

Even were we to assume, for argument, the majority holding that the persuasiveness of the right of free association depends, in part at least, upon the size of the unit, both of the schools here involved are small. They are not huge and impersonal. The district court's opinion, 363 F. Supp. 1200, 1201, 1202, indicates a maximum enrollment at Fairfax-Brewster School at 236 and at Bobbe's School an average of 200. In schools of that size, intimacy of personal association is still important, and the right of free association certainly should apply, if it does in any case, to units of such numbers. How great a size, if any, might destroy the constitutional protection is a question not now before us.[6]

It is one of the missions of law to balance conflicting social interests so as to give the maximum of protection to each.[7] Which interest will prevail will depend therefore upon special considerations in each context in which the conflict is presented. A good illustration of this point is to

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[6] The numbers involved in *NAACP v. Alabama* and *Gilmore* would seem to indicate that great numbers alone do not necessarily furnish sufficient cause to lose the constitutional protection of freedom of association.

[7] See Julius Stone, *Social Dimensions of Law and Justice* (Stanford University Press, 1966), Chapter 4, pages 164, *et seq.*, citing Roecoe Pound and other legal scholars. Somewhat this same idea is suggested in 122 U. Penna. L. Rev. 471 at 478, 479 (1973), and 74 Col. L. Rev. 449, 468, 469 (1974).

be found in a comment upon the district court's decision in the instant cases in *Segregation in Private Schools,* 122 U. Penna. L. Rev. 471, at 478, 479 (1973). It is there stated that "a balancing of Constitutional interests is necessary to produce a proper construction of Section 1981." The author continues:

> "Our discussion to this point suggests where the balance might be struck without seriously impairing either right. The right to contract protected in Section 1981 should be limited to contracts found in secondary, as contrasted with primary relationships. The former [sic, latter] are 'basically relationships between friends,' characterized by 'intimate association.' Secondary relationships, by contrast are 'impersonal, highly formalized relations between people,' for example, the relationship between buyer and seller . . . under this approach, discrimination would be allowed in primary relationships for any reason whatever, including racial bias, . . ."

The article suggests that such a differentiation reconciles the results in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972). If this approach is used, it seems to us that a secondary school as found here involves a primary relationship and thus is not within the scope of § 1981.

So far as the balancing of conflicting interests is concerned, the difference between the right to own property, under § 1982, and the alleged right to attend an independent school under § 1981 becomes apparent. The word "right" is ambiguous. See *Private Discrimination,* 74 Col. R. Rev. 449, at 469 (1974). It may mean an immunity from legal disability to own property or make a contract. In Hohfeldian

terms, this would be a privilege. Or it may mean a power to compel another to convey property or enter into contractual relations notwithstanding a refusal to do so solely because of race. It is not necessary to assume that the word right means the same in all contexts. If on the one hand we consider society's interest in upward mobility and the removal of invidious discrimination against disadvantaged groups, it would seem clear, as pointed out in the Columbia Law Review citation, *supra*, that a mere freedom from legal disability to own property would be of little value to a black person if prospective vendors could refuse to sell to him because of his race. There might be no other source from which he could purchase property. Thus, the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), can be readily understood and accepted, even were we not under obligation to accept and follow it.

The same basis of necessity is not available to support the desire of blacks to attend an all white independent school. The overwhelming portion of the burden of educating our people is borne by public schools, which by law are non-segregated. If all schools, nursery through college, are considered, in 1972, 86.6% attended public schools and only 13.4% attended non-public schools. If only secondary schools, which is what are involved in this case, be considered, statistics show that in 1972, 92.4% of students attended public schools and only 7.6% attended non-public schools. (American Almanac for 1974, page 108). These statistics are the more significant when it is considered that more independent schools, including all or practically all church affiliated institutions, do not use race as a basis for admission. Thus, so far as acceptance as a first-class citizen is dependent upon educational opportunity, the impact of schools such as those operated by the two appellants is diminutive. If it be asserted that the exclusionary policies of schools such as these ap-

pellants have invidious implications, it must be remembered that most, if not all, of the high prestige private schools, are not racially segregated. In fact, many of them make an affirmative effort to obtain black students. See *Segregated Academies and State Action*, 82 Yale L. Jour. 1436, at 1444 (1973). Indeed, at the time of the district court's decision in this case, appellee Colin Gonzales had been accepted by and was attending the Congressional School, a non-public school. 363 F. Supp. 1202. Insofar as society's interests in educational opportunity for all of its citizens and the removal of invidious discrimination are weighed against society's interests in true independence of non-public educational institutions and freedom of association, especially in connection with close, intimate relationships, we believe that, unlike the right to purchase property involved in *Jones v. Alfred H. Mayer Co.*, the balance is in favor of construing the right to make and enforce contracts protected by § 1981 as being a freedom from legal disability and not as being extended to prohibiting a non-public institution from operating on a racially segregated basis.

As we have previously indicated, we do not find it necesary to express an opinion on the constitutional validity of 42 USC § 1981, but we do feel compelled to say that the result reached by the majority is an unconstitutional and invalid application of the statute. Our conclusion is supported by the opinion of the court in *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), which adopts, in the opinion of the court, the language we have previously quoted from the dissenting opinion of Mr. Justice Douglas in *Moose Lodge* to the effect that people may band together in their association with whomsoever they please. And those cases specifically refer to the forbidden and highly suspect classifications of race and religion. Nothing in history or the precedents contains any suggestion that the same reasoning applied to a

religious school in *Pearce*, to a social club in *Moose Lodge*, and indeed (albeit in slightly different context) to private schools in *Gilmore*, should not apply here. And we think the majority takes too little account of *Norwood v. Harrison*, for in that case, in a discussion of the precise type of segregated private school involved here, the court unequivocally stated that the very bias here charged is neither invalid nor subject to sanction of law:

> "Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State." 413 U.S. 455, 469.

We would reverse the judgment of the district court on all points.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 73-2348
73-2349
73-2350

[Filed May 29, 1975, by William K. Slate, II, Clerk]

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,	:
Appellees,	:
v.	:

Russell L. Runyon, Katheryne E. Runyon,
Defendants,

Southern Independent School Association,
Appellant.

Nos. 73-2351
73-2352

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Fairfax-Brewster School, Inc.,
Appellant.

ORDER

Upon consideration of the petitions for rehearing filed on behalf of the appellants and the appellees,

IT IS ORDERED that Section IV-A of the opinion be amended, adding at the end thereof a paragraph reading:

> While allowing damages in favor of the McCrarys against Bobbe's School and in favor of Colin Gonzales because of his minority, the district court denied an award of damages to Mr. and Mrs. Gonzales since it concluded that their claim was foreclosed by the applicable statute of limitations. The statute applied was the

first sentence of Virginia Code § 8-24, applicable to actions for personal injuries. It is contended on appeal that the judge should have applied Virginia's five-year statute, the second sentence of § 8-24, applicable to actions not otherwise provided for in more specific statutes of limitations. While the action is brought under Section 1981, the damage claim is entirely referable to injured feelings and humiliation. We have held such claims asserted under the Reconstruction Acts to be governed by Virginia's two year statute. *Allen v. Gifford*, 4th Cir. 462 F.2d 615; see *Almond v. Kent*, 4th Cir., 459 F.2d 200. It is also contended that the five year statute for actions on a contract, Virginia Code § 8-13, applies, but it is clear that no action on a contract is involved.

IT IS FURTHER ORDERED that the petitions for rehearing be and each of them hereby is denied.

Upon consideration of the motion for allowance of attorneys' fees on appeal filed on behalf of the appellees,

IT IS ORDERED that the motion for allowance of attorney's fees be and hereby is denied.

In conformity with Alyeska Pipeline Service Company v. Wilderness Society, 43 U.S.L.W. 4561 (U.S. May 12, 1975), Judge Butzner withdraws that part of his dissent approving the district court's allowance of attorneys' fees on the basis of the private attorneys general theory. However, he retains the section which would affirm the allownace of fees because of the defendants' bad faith. *See* Alyeska Pipeline Service Company v. Wilderness Society, *supra*, 43 U.S.L.W. at 4567, 4570 n. 46. Judge Winter and Judge Craven concur in this amendment of Judge Butzner's dissent.

Except as modified herein, each member of the court adheres to the position he took in the previously released opinions.

FOR THE COURT

/s/ Clement F. Haynesworth, Jr.
Clement F. Haynesworth, Jr.
Chief Judge, Fourth Circuit

May 26, 1975

APPENDIX B

[Filed July 27, 1973]

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COLIN M. GONZALES, *et al.*,	:	
Plaintiffs,	:	**Civil Action No.**
v.	:	**494-72-A**
FAIRFAX-BREWSTER SCHOOL, INC.	:	
Defendant,	:	
and	:	
MICHAEL C. McCRARY, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No.**
RUSSELL L. RUNYON, *et al.*,	:	**495-72-A**
Defendants,	:	

and :

SOUTHERN INDEPENDENT SCHOOL: ASSOCIATION, :

Intervenor-Defendant. :

MEMORANDUM OPINION AND ORDER

On May 17, 1954, the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954). The same year Fairfax-Brewster School was founded. It commenced operations in 1955. In 1958, Bobbe's Private School commenced operations. Neither school receives any assistance, financial or otherwise, from any state, local or federal agency; and each relies entirely on funds derived from tuition paid by students to support its operations. In 1956, Fairfax-Brewster commenced operation of a summer day camp and in 1967, Bobbe's did the same thing.

The enrollment at Fairfax-Brewster School grew from an average of 21 in the first year, 1955-56, to 223 in the year 1972-73. The rise in enrollment has generally been increasing except for the year 1969-70, when it dropped to 177 from the previous year's 208. The day camp's enrollment records are not available prior to 1962, but it shows a growth from 21 that year to 236 in the summer of 1972. An unusually large increase was shown in 1969 over the previous year, but this dropped back in 1970.

Bobbe's School grew from 5 in 1958 to an average of 200 in the years 1966-72. The day camp has averaged 100 students per year since its commencement. Neither school has ever had a black enrolled at either its day camp or school. Both schools require submission of an application form, a

medical certificate as to the child's health, and a personal interview with the parties.

In early May of 1969, in response to an advertisement appearing in the "yellow pages" of the telephone directory similar to Pltf's Ex. 3, the parents of Colin M. Gonzales, both of whom are black, as is Colin, telephoned and then visited the school where they were shown around. Being pleased with what they saw, they completed, on forms then furnished them by the school, an application for the day camp and later a medical certificate prepared by a doctor. They subsequently submitted these to the school with a check for either $15 or $20. On May 16, 1969, Mr. and Mrs. Gonzales received the medical certificate and check in the mail with a form letter from Fairfax-Brewster (Pltf's Ex. 2) stating that the school was "unable to accommodate the application." No reason was given. Upon receipt of the letter Mr. Gonzales called the school, spoke to a person who identified himself as Captain Reiss,[1] and, in response to his inquiry as to why his son's application was rejected, was told "we are not integrated." Both Robert S. Reiss and Stuart Reiss denied any such conversation. They then stated that Colin, whom they believed was primarily interested in entering the first grade, was rejected, not on the basis of his race, but because his application lacked supporting data as to his previous schooling. Moreover, knowing that Colin had previously attended Crossroads Day Nursery, they claimed he would not qualify for the first grade. Consequently, since eligibility for the day camp was contingent on one's being qualified for the first grade, they felt it would be unfair to allow Colin to enter the day camp and then have to

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[1] Capt. Stuart A. Reiss is the Chairman of the Board while his son, Robert S. Reiss, is the Administrative Director, and his daughter-in-law, Olga M. Reiss, the registrar.

be withdrawn before the commencement of the academic year. In conclusion, the three Reisses all denied that it was the school or day camp's policy to exclude an applicant because of his race. The Court rejects this testimony as unbelievable and finds that the reason for the rejection was because Colin was black.

Subsequent to his son's rejection by Fairfax-Brewster, Mr. Gonzales telephoned Bobbe's School where, in answer to an inquiry as to whether it was integrated, he was told that only members of the Caucasian race were accepted. He filed no formal application with Bobbe's School.

Application was ultimately made for Colin at Congressional School, a non-public school, where he was accepted and did well.

In August 1972, in response to an advertisement in the "yellow pages" of the telephone directory, Mrs. Sandra McCrary, who is black, called Bobbe's Private School to enroll her 2-year-old son, Michael, in nursery school. After first inquiring as to the price, policies, meals, transportation and facilities for "toilet training," she asked if the school was integrated. Upon receiving a negative reply, she asked if the school accepted black children. The answer to this question was also "no." She filed no formal application with Bobbe's.

Bobbe's denied receiving telephone calls from either Mr. Gonzales or Mrs. McCrary; stated that it was not the policy of the school to exclude anyone because of race; denied that the school has ever told anyone that the school was not integrated; and stated that no one can be considered without a personal interview with the applicant and his parents or without a formal application being submitted with an accompanying medical certificate. Bobbe's introduced further testimony that no black child had ever applied for enrollment.

The Court finds that the calls were made to Bobbe's and that both Colin Gonzales and Michael McCrary were denied admission because they were black. It is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told it was useless.

The policy of the schools with regard to exclusion of blacks was corroborated by Mrs. Bryant and Mr. Brooks. The former testified that in 1972 she telephoned Fairfax-Brewster and Bobbe's School to inquire about their admission policies. She testified that both schools told her they were not integrated and would not accept blacks. Mr. Brooks, a deputy Equal Employment Opportunity Commission officer with the Navy and Mrs. McCrary's supervisor, testified that after he became aware of the McCrary's allegations as raised in this suit against Bobbe's he decided to call for himself. He stated that during his telephone conversation of May 31, 1973, with a Mr. Gates at Bobbe's, he asked whether the school was accredited and if it was integrated. Upon receiving a negative response to the latter question Brooks further asked if blacks were admitted. Again he was told "no."

Colin Gonzales has filed an action against Fairfax-Brewster. Mr. and Mrs. McCrary, Michael McCrary, and Colin Gonzales have filed an action against Bobbe's. The sole basis for the actions is 42 U.S.C. § 1981.[2] The Southern Independent School Association intervened as a party-defendant in the

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[2] Originally 42 U.S.C. § 2000a was alleged as a basis for the actions. This was withdrawn prior to trial.

action against Bobbe's, asserting that it represents "non-profit, private white schools in seven states and the class of all similarly situated schools and their associated students and parents."

The intervenor takes a different tack from that of the principal defendants. It concedes that race is a factor in its policies of exclusiveness, but says that 42 U.S.C. § 1981 cannot be used to compel admission of a black child to a white school of the type it represents, and prays an adjudication to that effect.

The actions were conslidated and tried on July 16 and 17, 1973.

No determination was made prior to trial that the actions might be maintained as a class action, either as asserted by the plaintiff or the intervenor; and the Court does not feel it should be so maintained. Accordingly, the decision is only binding on the named plaintiffs, the named defendants, and those schools which actually comprise the intervenor.

42 U.S.C. § 1981 reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

If read literally the act covers these plaintiffs, who have been denied their right to make a contract with the defendants because they are not white. That it is to be read literally is no longer open to question. In considering 42 U.S.C. §

1982, the Supreme Court has said that ". . . Congress meant exactly what it said." *Jones v. Mayer Co.*, 392 U.S. 409, 422 (1968). Interrelated as § 1981 and § 1982 are, there is no reason to think Congress meant any less when it enacted § 1981. *Tillman v. Wheaton-Haven Recreation Ass'n.*, 41 U.S.L.W. 4311 (February 27, 1973). The purpose of both is to prohibit all racial discrimination against non-whites,[3] whether that infringement be "by 'State or local law,'" or "by 'custom, or prejudice.'" *Jones v. Mayer Co., supra*, at 423. In other words, no state action is necessary to invoke § 1981.

Although both schools claim to have strictly established criteria for enrollment, the end result of their admission policies as applied to both Colin and Michael evidences no "plan or purpose of exclusiveness" for selection of students *"other than race."* [Emphasis added.] *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969). This disposes of the argument that these were "truly private" schools since the Opportunity to attend these schools was open to every white child. *Tillman*, at 4313 and 4314. It is difficult to accept the defendants 'argument that the plaintiffs may not have been qualified to meet their schools' high standards. This answer is certainly unavailing with regard to the day camp or nursery and is suspect insofar as the first grade is

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[3] The analogy to all black academies, all Chinese schools, and all rabbinical schools is inapposite. These institutions don't fall within the proscription of § 1981. Whatever else may be said of their policies, those institutions are free to discriminate against whites, or against other non-whites if whites are similarly discriminated against, without running afoul of § 1981.

concerned since Colin Gonzales, because of his race, was never given the opportunity to demonstrate that he was qualified.[4]

Intervenor proffered testimony which would establish:

1. That intervenor parents act rationally in holding a belief that segregation is desirable in education in light of the performance record of these schools and current scientific theory; and

2. That the intervenor schools are academically successful beyond the national public school average and have low disciplinary problems, both of which are causally related to segregated policies.

The Court finds this testimony to be irrelevant to the issue in these actions, feeling that such testimony, as a defense to outlawed policies of segregation, embodies a concept rejected in *Brown v. Board of Education, supra.*

Intervenor has seized on certain dicta of the Supreme Court in *Norwood v. Harrison,* 41 U.S.L.W. 5094 (June 25, 1973), which states that "private bias" is not proscribed by the Constitution and that "private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment. . . ." Comforting as these words may be to the defendants out of context, it must be pointed out that § 1981 was not there involved; that *Jones v. Mayer Co.*, was cited to the contrary as an

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[4] The defendant Fairfax-Brewster points to page 2 of its handbook (Def's Ex. 2) to indicate that Colin Gonzales should have submitted a report card and other pertinent records from his previous school, the omission of which was a ground for his rejection. The same page of the handbook provides for Entrance Examination if previous scholastic records are inadequate. Colin was denied the opportunity to take this examination since he was never told that his scholastic record inadequacy was the reason for his rejection.

example of private discrimination made unlawful by Congress; and that the opinion specifically points out that "[t]his case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race or religion. . . ." *Norwood v. Harrison*, at 5095. Moreover, although perhaps not legally significant, as a practical consideration, it is inconceivable that the opinion in the case would have attained the indicated degree of unanimity if it stood for the proposition urged by the intervenor. Accordingly, the Court feels *Norwood* is not authority for that proposition.

While no relief is sought under 42 U.S.C. § 2000a, *et seq.*, it seems appropriate to point out that in the Court's view, this act is not a limitation on § 1981, and consequently the exemption of 42 U.S.C. § 2000a(e) for private establishments does not apply in this case. Moreover, as indicated before, Sullivan v. Little Hunting Park has abolished traditional notions of what is "private" insofar as these types of actions are concerned.

Plaintiffs are accordingly entitled to the relief requested, namely:

A. An adjudication that the policies with respect to the admission of students to defendants' day camp and school, of discriminating on the basis of race or color, are a violation of 42 U.S.C. § 1981.

B. A permanent injunction against the defendants and intervenor, their agents and those acting in concert with them, prohibiting them from following the policies described in Paragraph A.

C. An award of compensatory[5] damages for the embarrassment, humiliation and mental anguish which the Court finds to have been suffered by the plaintiffs as follows:

1. In favor of Colin Gonzales:	
(a) Against Fairfax-Brewster School	$2,000
(b) Against Bobbe's School	500
2. In favor of Michael McCrary against Bobbe's School	1,000
3. In favor of Sandra McCrary and Curtis L. McCrary against Bobbe's School	2,000

D. An award of attorney's fees as follows:

1. Against Fairfax-Brewster School	$1,000
2. Against Bobbe's School	1,000

E. Their costs.

And it is so ordered.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
July 27th, 1973

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[5] Punitive damages are not awarded. While the defendants' acts have here been declared improper, insofar as the Court can determine similar acts have not heretofore been so declared. Accordingly, the defendants cannot be said to have acted recklessly or wilfully in disregard of clear existing law.

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2351

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales,

Appellees,

vs.

Fairfax-Brewster School, Inc.,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was aruged by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part.

/s/ WILLIAM K. SLATE, II
William K. Slate, II
Clerk

Filed April 15, 1975

APPENDIX D

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 9

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 13

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall

have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

STATUTES INVOLVED

42 U.S.C. Sec. 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.